IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION.

CRIMINAL APPEAL NO.4 OF 1990

The State of Maharashtra] ... Appellant.

versus

1. Flora Santuno Kutino,]
Age 45 yrs. R/o Adkur,]
Tal.Chandgad, Dist.Kolhapur]
]

2. Francis Luis Lizario,]
Age 33, R/o. Adkur,]
Tal.Chandgad, Dist.Kolhapur]
]

3. Arjun Ganu Naik,]
Age 21 yrs. Occ. Agri.]
R/o Arjunwadi,]
Tal.Gadhinglaj Dist.Kolhapur]

4. Ramchandra Babu Naik,]
Age 30 yrs. Occ. Agri.]
R/o Arjunwadi,]
Tal.Gadhinglaj Dist.Kolhapur]

5. Ganu Yallappa Naik,]
Age 60 yrs. Occ. Agri.]
R/o Arjunwadi,]
Tal.Gadhinglaj Dist.Kolhapur]

6. Subrao Vithoba Patil,]
Age 75 yrs. Occ. Agri.]... Respondents
R/o Saroli,] (Original -
Tal.Gadhinglaj Dist.Kolhapur] Accused)

Mr.P.A.Pol, APP, for the State/appellant.
Mr.S.A.Ingawale for the accused/respondents.

CORAM : D.G.DESHPANDE
S.R.SATHE, JJ.
DATED : FEBRUARY 09, 2007.

JUDGMENT : [PER D.G.DESHPANDE,J.]

1. Heard learned APP Mr.Pol for the State - Appellant and, learned advocate Mr.Ingawale for the Accused - Respondents.

2. This appeal is filed by the State challenging the judgment dated 28.08.1989 of the

IIIrd Addl.Sessions Judge, Kolhapur by which the learned Addl.Sessions Judge acquitted all the accused of the offences under Sections 318, 176, 201 r/w 34 and of the offences under sections 304, 315, 314, 316 r/w 34 of the Indian Penal Code. By the said judgment accused No.1 was also acquitted under Section 376 of the Indian Penal Code.

3. The prosecution case, in brief, is as under :-

. Victim in this case is one Yallubai. She was the daughter of Babu Naik (PW 7). He was living in Arjunwadi with his family members. He has two houses in the said village. Yallubai used to cook food for them and used to go to other house for tethering cattle. Accused No.3 used to go to the house of Yallubai for taking food and she used to serve food to him. Illicit relationship was developed between them. She became pregnant from accused No.3. In order to avoid pregnancy, accused No.3 took Yallubai to the hospital of accused Nos. 1 and 2 at Mouje Adkur. She was admitted for abortion. Prior to that, accused No.3 took Yallubai to the hospital

of Dr.Dalwi (PW 8). But he refused to do abortion.

4. When the abortion was carried on at the hospital of accused Nos. 1 and 2, Yallubai died due to excessive bleeding and in order to hide this offence, accused No.2 with the help of his friend Albert Lobo (PW 5) brought the body of Yallubai to Adkur and all the accused buried her body within the limits of Adkur and Saroli.

5. The father of Yallubai had lodged a complaint that his daughter was missing from 12.8.86. On 14.8.86 PW.1 Head Constable received one anonymous letter and, therefore, he started making inquiry. He learnt about the aforesaid activities of the accused. On 19.8.86 he lodged complaint i.e. FIR (Exhibit 21) against the accused. Then investigation was carried out by PSI Pratap Randiwe (PW 12). The accused were arrested. Dead body of Yallubai was recovered. It was sent for post-martem. Articles used for burying the dead body of Yallubai were recovered. From the statement of accused under Section 27 of the Evidence Act, clothes were recovered. Hospital was seen and visited. Incriminating

articles were seized and when the Doctor opined that Yallubai died as a result of shock due to perforation of uttered following abortion i.e. due to excessive bleeding on account of abortion, a charge sheet came to be filed against the accused.

6. The prosecution has examined in all thirteen witnesses and produced number of documents in support of the charges which were framed against all the accused. The charges against accused No.1 to 3 were under Sections 304, 315, 314, 316 r/w 34 of the Indian Penal Code and, the charges against accused Nos.1 to 6 were under Sections 318, 176 and 201 r/w 34 of the Indian Penal Code. Accused No.3 was charged for the offence under Section 376 of the Indian Penal Code. In support of each charge, the trial Court framed 8 points for determination, but gave negative findings on all those points and consequently acquitted the accused. Hence this appeal.

7. The learned APP Mr.Pol contended that the approach of the trial Court is totally and completely wrong. The trial Court has failed to

take into consideration the vital and important evidence of P.W.8 Dr.Ramchandra Dalwi to whom accused No.3 had taken Yallubai for carrying out abortion. He further contended that the trial Court also disregarded the evidence of father and grand-mother of Yallubai about intimacy of accused No.3 with Yallubai and Yallubai becoming pregnant before marriage and also disregarded other material circumstantial evidence brought on record in the form of recovery of incriminating articles at the instance of accused No.3 and other accused. The learned APP, therefore, contended that in any case and at any rate accused No.3 is required to be convicted for the offences charged against him though offences under sections 376 and 304 may not be attracted.

8. On the other hand, learned advocate Mr.Ingawale, appearing for the accused, contended that there are number of lacunae in the prosecution case. For example, according to him, missing report filed by the father of Yallubai was not placed on record, nor anonymous letter received by the police constable. He, therefore, contended that the FIR was lodged by the constable after making inquiry and, therefore, it

could not be treated as FIR. Regarding evidence of father and grand-mother of Yallubai, Dr.Dalwi (PW 8) and other witnesses, the learned advocate for the accused contended that none of them has identified the accused in the court even though, all these witnesses referred to accused No.3 as a person responsible. Mr.Ingawale for the accused also contended that the evidence regarding discovery could not be relied upon, as the independent panch witnesses turned hostile and no reliance could be placed on the evidence of Investigating Officer. He, therefore, contended that the judgment of the trial Court was not liable to be interfered with. He also contended that the statements of the accused under Section 27 of the Evidence Act recorded by the police were almost like confession of crime with all the history given and, therefore, they are not at all admissible. Mr.Ingawale for the accused also contended that neither the father nor the grand-mother of Yallubai has stated that there were illicit relations between Yallubai and accused No.3. This, according to him, is a major lacuna in the prosecution case, and the benefit of which was rightly given to accused No.3 and other accused.

9. At this juncture, it is necessary to clarify that the statements of the accused under Section 27 will be read in evidence only in so far as they relate to discovery of incriminating articles and other part about confession will have to be totally disregarded as inadimissible in evidence.

10. In view of the rival submissions it is necessary to scan and scrutinise the evidence. P.W.1 is Shankar Tulajaram Powar. He was working as Head Constable at Nesari Police Station at the relevant time. He has stated that one Babu Nagoji Naik came to police station during night between 12.00 to 12.30 and made a report about missing of his daughter Yallubai. This witness (PW 1), therefore, made entry in the missing register at Sr.No.1 of 1986. Then on 14.8.86 he received one anonymous letter requesting for immediate inquiry. Unfortunately neither the entry in the missing register nor the anonymous letter was produced on record by the prosecution.

11. P.W.1 has, further, stated that thereafter he called accused Arjun Naik, Ganu

Naik, Subrao Patil and Ramchandra Naik and made enquiry from them and they told that Yallubai had illicit relations with accused No.3 Arjun Naik and she was pregnant from him, that she was taken to hospital at Adkur for her abortion, that she was given injunction and in that attempt she died. Thereafter accused No.3 returned to his village Arjunwadi and told his father about the death of Yallubai and asked his father to call her parents. But thereafter accused No.3 took other accused with him to Adkur. They carried spade with them. Yallubai's body was kept in a gunny bag, it was tide and buried in Adkur limits.

12. P.W.1 has stated about this information. He lodged FIR at Exhibit 21. The learned APP tried to contend that the information was given by these accused to P.W.1 before they were made an accused and before registering FIR and hence it is admissible in evidence. We will consider that aspect later on.

13. Next witness is the father of Yallubai. He is P.W.7. He has stated that he was residing at Arjunwadi. Accused No.3 used to take food at his

house and accused Nos. 3 to 5 used to work in his field. P.W.7 used to work in their field i.e. in the field of accused Nos. 3 and 5. He has stated that Yallubai used to be in the house and she used to cook food. He had no doubt about illicit connection of accused No.3 and Yallubai. But when he returned from Bazaar he found that Yallubai was missing from house. He inquired about her from his mother but she could not tell anything. Thereafter he doubted that accused No.3 might have kidnapped her. Then he went to Nesari to the house of maternal uncle of Yallubai for making inquiry. But Yallubai was not there. He, therefore, lodged a complaint against accused No.3. After four days he learnt that accused No.3 had taken Yallubai to the hospital of accused Nos. 1 and 2 at Adkur; that Yallubai was pregnant from accused No.3; that she was taken to that hospital for abortion; that she died and buried within the limits of Adkur and Saroli.

14. Admittedly, this witness does not know about illicit relations of accused No.3 with Yallubai. But he has positively stated that Yallubai used to cook food and accused No.3 used

to come to his house for taking food and, accused No.3 used to work in his field along with accused No.5. The report lodged by him with the police station is not on record as stated earlier.

15. In the cross examination this witness (PW 7) has stated that Yallubai was not going to field but she used to remain in the house. He has admitted that accused Nos. 3 and Ramu Naik were facing litigations regarding landed property. But he denied the suggestion that on the say of Ramu Naik he had given the name of accused No.3 in his complaint. He denied that he admitted Yallubai in the hospital as she was serious. There is nothing much in the cross examination of this witness.

16. The next witness for the prosecution is the grand-mother of Yallubai. She is P.W.10. At the time of recording her evidence, she was 70 years of age. She has stated that accused Nos. 3 and 5 used to come to their fields for work. Her son Babu (PW 7) was having three sons and three daughters including Yallubai. Yallubai used to cook food and accused No.3 used to come to their house for taking food and Yallubai used

to serve food to him. She has also stated that when Yallubai was taking bath, she noticed that Yallubai was pregnant but she did not enquire from Yallubai in this regard.

17. The next witness of the prosecution is P.W.8 Dr.Ramchandra Dalwi, resident of Naganwadi. He has stated that three years before his evidence, accused No.3 came to him at about 5.30 a.m. in the morning on 13.8.86. Accused No.3 wanted to bring one girl in the hospital. The doctor, therefore, permitted him to do so. Within five minutes, accused No.3 brought one girl and told that the girl was to be aborted upon. The girl was wearing printed saree (Patal). She was aged 17/18 years and when the doctor made enquiry, she concluded that she was carrying 6 months and she was the resident of Arjunwadi. The girl also told the doctor that she was pregnant from accused No.3. Then doctor told accused No.3 and the girl that abortion could not be done at his hospital and asked the accused to bring her parents and money for sending her to Belgaum hospital. The doctor also stated that he had no facility for abortion in his dispensary. Heavy reliance was placed upon

this witness by the prosecution. Whereas unfortunately for the accused there is absolutely no cross examination worthy of consideration. The witness admitted that he had not seen accused No.3 previously and he was not knowing him and that he came to know about the name of accused from police. He could not explain how the name of Arjun Naik had appeared in his statement. His statement was recorded on 30.8.86. Suggestion given to him that accused No.3 never came to his hospital was denied by him.

18. The prosecution has also relied upon one more witness i.e. P.W.9 - Krishnamurti Joti, resident of Naganwadi. He has stated that he had taken contract to run canteen at S.T.Stand, Naganwadi since 1978 and about three years before, he saw accused No.3 sleeping on the bench of the S.T.stand with one lady. He also stated that they had missed bus and, therefore, they halted at the S.t.stand on that night. But on the next day morning, this witness had not seen them. In the cross examination, he admitted that he had never seen accused No.3 prior to that night and till the day of his evidence. We are not inclined to place any reliance upon this

witness because he had no specific reason to note down the presence of the accused with one lady on that particular night. He had never given description of that lady nor approximate date and time when he saw the accused with one lady on that night.

19. The prosecution also examined one Special Executive Magistrate. He is P.W.13 - Vasant Rane. He has stated that he was intimated by police to record statement of one Albert Luis Lobo. He, therefore, asked the police to keep the witness present in the premises of Judicial Magistrate. He went there and recorded the statement of Albert Luis Lobo as per Exhibit 53. He has also stated that the police were not present there and the witness voluntarily gave his statement. The witness signed it and he also counter signed it. The only suggestion given to him is that he had not recorded the statement and, he prepared it as per the say of police and thereafter obtained the signature of witness. He denied that suggestion. Then he also admitted that there is no mention on the statement (Exhibit 53) that it is under Section 164 of the Cr.P.C.

20. The next witness examined by the prosecution is PSI Pratap Randiwe (PW.12) who is the Investigating Officer. Before considering the evidence of PSI, it is necessary to note that there are number of documents tendered by the prosecution and exhibited by the court. In this regard a Roznama dated 21.8.89 of the trial court is important. It shows that report of the APP under Section 294 of the Cr.P.C. was filed. [It should be an application of the APP calling upon the defence to admit the documents]. It is accompanied by a list of 18 documents. The list is at Exhibit 13 and then number of documents admitted in evidence on that day itself which means that the defence did not raise any objection for admitting those documents. Those documents, being important, are named as under :-

1. Panchanama of arrest of accused dated 19.8.86. (Exhibit 16).

2. Inquest Panchanama dated 19.8.86. (Exhibit 17).

3. Panchanama of clothes from the dead body

after post mortem dated 20.8.86. (Exhibit 18).

4. Advance certificate of dead body dated 20.8.86. (Exhibit 19).

5. Report of C.A. Bombay dated 22.12.86. (Exhibit 20).

6. First Information Report given by Shankar Tulajaram Powar dated 9.8.86. (Exhibit 21).

7. Panchanama of seen of offence dated 16.8.86. (Exhibit 23.)

8. Panchanama of the place from where the dead body buried shown at the instance of accused No.3 Arjun Ganu Naik dated 19.8.86 (Exhibit 25).

9. Panchanama of Memorandum under section 27 of accused No.1 Floor Kutino about production of weapon. (Exhibit 26).

10 Panchanama of production of spade by

accused No.5 Ganu Yallappa Naik dated 21.8.86. (Exhibit 27).

11. Panchanama of production of pick-axe by accused No.4 Ramchandra Babu Naik dated 21.8.86. (Exhibit 28).

12. Panchanama of attachment of earth from the place of dead body buried dated 22.8.86. (Exhibit 29).

13. Production of abortion bag by accused No.3 Arjun Ganu naik dated 22.8.86. (Exhibit 30).

14. Panchanama of attachment of medicines from the hospital of accused No.1 Flora Kutino dated 22.8.86. (Exhibit 31).

15. Panchnama of production of carpet (Ghongade) by accused No.2 Francis Lizario dated 22.8.86. (Exhibit 32).

16. Memorandum regarding Muddemal of accused

No.3 Arjun Naik dated 22.8.86. (Exhibit 33).

17. Memorandum of production of torch by accused No.4 Ramchandra Naik dated 24.8.86. (Exhibit 35)

18. Another panchanama dated 24.8.86. (Exhibit 36).

21. Then on 22.8.1989 also certain documents were produced and admitted in evidence. Those are :-

A. Report given by PSI Chandgad dated 7.2.87 to the Tahsildar, Chandgad. (Exhibit 46).

B. Hand sketch drawn by Circle Officer, Chandgad of scene of offence. (Exhibit 47).

C. Post Mortem Notes of the dead body of Yallubai Babu Naik. (Exhibit 48).

D. Statement recorded by P.W.No.13 of Shri

albert Luis Lobo dated 29.8.86. (Exhibit 53).

22. It will be seen from the aforesaid circumstances that very important documents were exhibited by consent of the defence which also means that the accused have not challenged the documents at all in any manner whatsoever. Therefore, these documents will have to be looked into and gone for assessing the prosecution case.

23. It is to be clarified that so far as statement of Albert Luis Lobo (Exhibit 53) is concerned, the trial Court has rightly declined to believe it. Because when Albert Luis Lobo was examined as P.W.5 and when he turned hostile, he was not confronted with this statement. In fact, whether the Special Executive Magistrate had powers to record the statement of any witness under Cr.P.C. is a different question. But if the statement is there and the person is examined as witness and he turned hostile, then it was necessary for the prosecution to confront the witness with the said statement. That exercise is not done at all and, therefore, the statement of Albert Lobo (PW 5) is of no use even if he had

made it voluntarily before the Special Executive Magistrate.

24. It has to be noted at this juncture that the case was not at all conducted by the Public Prosecutor properly. He has not been careful and diligent but on the contrary reckless when he knew that the statement of P.W.5 Albert Lobo recorded by the Special Executive Magistrate and the witness turned hostile, it was his duty to confront the witness with his previous statement. Further when each of the panchanama was admitted by the defence under Section 294 of the Cr.P.C. and it was exhibited, then it was at all not necessary for the APP to examine any witness to prove those panchanamas. However, he examined the panch witnesses who turned hostile.

25. The prosecution examined Arjunarao Yallappa Bijaganikar as P.W.2. He turned hostile on the panchanama of bed-sheet where Yallubai was seen lying. Next witness examined by the prosecution is Akabar Mahamad Shaikh as P.W.3. He turned hostile on the panchanamas at Exhibits 23, 25, 26, 17, 28, 29, 30, 31, 32 and 33.

Manohar Bhujangrao Mohite is the next witness examined by the prosecution as P.W.4. He is the panch witness. He proved panchanamas at Exhibits 35 and 36. He supports the prosecution case. The prosecution has examined another witness Albert Luis Lobo as P.w.5. He turned hostile on burying of body of deceased Yallubai in gunny bag. The next witness is Krishna Appa Kamble (PW 6). He also turned hostile on the panchanama of digging out a corpse.

26. The Investigating Officer PSI Pratap Randiwe (PW 12) has proved all the panchanamas. When the panchanamas were exhibited by consent of parties and when in addition the IO has given evidence regarding those panchanamas, then evidence of IO can certainly be considered in the proof of panchanamas. These panchanamas, which are proved by IO Pratap Randiwe (PW 12) and admitted by the defence and then exhibited, are of following nature. It is also to be noted at this juncture that most of these panchanamas include detailed statements of the accused which are nothing but confession. But all that is required to be disregarded and discarded because they are not admissible in evidence.

27. We are, therefore, considering those panchanamas only to the extent admissibile. It was accused No.3 Arjun Ganu Naik, according to P.W.12, who lead the police to the spot where the dead body of Yallubai was buried. P.W.12 has stated that he thereafter called two panchas, the Tahsildar Chandgad and doctor, then along with accused Nos. 3 and 4 went to the spot. D.S.P. was also present and when the accused showed the spot, the dead body of Yallubai was recovered and inquest panchanama was made as per Exhibit 17 which is signed by the panchas, the police officer and Dr.Shinde. It is stated in the panchanama, as disclosed by the accused No.3 Arjun Naik, that accused No.3 will show the spot where the dead body of Yallubai was buried, then police party came there along with four persons, digged the spot and a corpse of female kept in a gunny bag and tide with jute rope was taken out. It was identified by the brother of Yallubai as that was Yallubai. It was noted that internal part of the body had come out of the vagina of Yallubai. This panchanama is signed by the police officer, two male panch, one female panch, and also by SEM Suryakant Upadhye and the doctor.

This corroborates the testimony of police officer that two persons were present.

28. Then another panchanama was drawn. It is at Exhibit 18. It is about the gunny bag in which the dead body of Yallubai was kept and about the clothes recovered from her body. Soil was attached to the gunny bag. Other articles including blouse, petticoat, jute rope with soil, pieces of broken bangles and clothes were also recovered. When P.W.1 2 gave his evidence and proved all these documents, he was not cross examined at all with a view to falsify the evidence given by him. Only 5 questions were put to him. He denied the suggestion that he had not prepared the panchanama about receipt of medicines. He also denied that none of the accused had given any memorandum i.e. no disclosure under section 27 was made by any of the accused. He denied that he had not seized any articles as per Panchanama Exhibits 26 to 32, 35 and 36. From this cross examination it will be clear that there is absolutely no challenge to the fact of accused No.3 pointing the place where Yallubai’s body was buried.

29. At this juncture three more important pieces of evidence were tendered by the prosecution in the form of panchanamas. They are at Exhibits 27, 28 and 29. These panchanamas were exhibited by consent of defence under Section 294 of the Cr.P.C. The witnesses examined by the prosecution, unnecessarily in this regard, turned hostile. But the IO PSI Pratap Randiwe (PW 12) has proved these panchanamas and, there is absolutely no cross examination in that regard. Regarding Exhibit 27, P.W.12 has stated that accused No.5 desired to point out the spade used by him. Accordingly memorandum was prepared in presence of panch. It is at Exhibit 27. Then police party went to the house of accused No.5 and from the loft in kitchen the said accused produced the spade to which soil was attached both on the handle and in the iron portion of the spade. Then another document is at Exhibit 28. It is about recovery of pick-axe at the instance of accused No.4 Ramchandra Naik. His statement was recorded in presence of panchas, as per the evidence of PW 12. Accused No.4 expressed his intention to take out pick-axe from the place where he had hide it. The police party, therefore, after preparing

memorandum, went to the spot as shown by accused No.4 and, from the house where the family members of accused No.4 were residing, the accused No.4 took out the pick-axe from the room. There also soil was attached to the handle and to the iron portion. It was seized under the same panchanama. Exhibit 29 is another panchanama. It is about recovery of mud or soil from the place where the dead body of Yallubai was buried. This was shown by accused No.3 Arjun Naik and, when accused No.3 led the police party, in his presence sample of soil was taken. It is pertinent to note that this soil was of red colour and the soil attached to the handle and iron portion of pick-axe and spade was also of red.

30. Another most important evidence tendered by the prosecution in the form of document is panchanama Exhibit 30. It was at the instance of accused No.3 Arjun Naik. In this regard statement of accused No.3 was, therefore, recorded under Exhibit 30 in presence of panchas. He has stated that he would be showing the place where the plastic bag containing foetus removed from the womb of Yallubai was thrown. His

statement was recorded in presence of panchas and then accused No.3 led the police party in a jeep to a field having sugar cane crop. He went in the crops along with police and panchas and one plastic bag with white paper but open was recovered. It was a torn bag and soil was attached to the bag and clothes. It was wet. The plastic bag and white paper were giving offensive odour. The police searched the field but they did not find the foetus.

31. Then there is one more important panchanama. It is at Exhibit 36. It is at the instance of accused No.6 Subrao Vithoba Patil. It is in respect of clothes of Yallubai which were on her person at the time of abortion and which were given to her by the doctor. This statement was recorded by P.W.12 in presence of panchas. Then police officer along with panchas went along with accused No.6 and recovered a bag from a pond. The clothes were there. They were washed in water from pond and they were as under:-

A six yard green colour cotton sari

> design of white red flowers. One old brownish or reddish terriycot blouse with sleeves and plastic buttons. One brownish or reddish cotton petticoat with design of green white flowers print. One gunny bag (sufala) etc.

This panchanama is at Exhibit 36. Then P.W.12 has stated that all those articles were sent by him to the C.A., Pune and he had also received report in that regard. Report of the C.A. is admitted and exhibited in evidence by consent of the defence. It is at Exhibit 20. There is no challenge to it at all. The four articles were before the C.A. i.e. one gunny bag, one spade, one pick-axe and earth, red in colour. The result of the C.A. is,

> "Earth from Exhibit 1, Exhibit 2 and Exhibit 3 tallies with earth ------- in Exhibit 4 in respect of chemical composition and physical ------ properties".

32. The over all effect of this evidence is that accused No.3 pointed the place where

Yallubai was buried. The spade and pick-axe were used in burying the body of Yallubai and, the sample of the soil was taken from that place and, even the soil found attached to the spade and pick-axe is identical not only in colour but also upon chemical analysis. This piece of evidence is brought on record by the aforesaid panchanamas specifically named. Taking on those panchanamas on record by consent of defence and further additional proof of those panchanamas by the IO without any challenge whatsoever from the side of the accused creates a strong and very strong case against some of the accused and at any rate against accused No.3.

33. It is true that from the evidence of PSI Randiwe (PW 12) and the birth certificate produced by him, Yallubai was not minor. There is no direct evidence that Yallubai was pregnant from accused No.3 but the fact that she was pregnant at the time of her disappearance is fully supported by her grand mother and Dr.Dalwi, who was medical practitioner and has nothing to do with accused No.3 and is totally independent witness and has categorically stated that on 13.8.86 at about 5.30 a.m. in the morning

accused No.3 came to his dispensary and asked the doctor that Yallubai was to be aborted upon. Yallubai was pregnant from accused No.3 and soon thereafter Yallubai disappeared and her body was found at the place pointed out by accused No.3. The instruments used in burying the body of Yallubai were recovered at the instance of accused as stated above. All this evidence is sufficient to hold that accused No.3 was responsible for causing abortion, in that attempt Yallubai died, then he destroyed the evidence by burying the body of Yallubai.

34. One most important factor is that in his evidence P.W.8 has stated that when the girl came to him along with accused No.3, she was wearing printed saree (patal). Panchanama of clothes of Yallubai at the time of abortion shows that she was wearing printed saree. This therefore direct corroborates the testimony of P.W.8 that Yallubai and accused No.3 had in fact gone to P.W.8 Dr.Dalwi for causing abortion and, there is no hesitation to accept the version of the doctor that Yallubai told him that she was pregnant from accused No.3.

35. It may be that missing report filed by the father of Yallubai was not on record. It may be that anonymous letter received by the constable (PW 1) was also not on record. But visit of accused No.3 with Yallubai to P.W.8 Dr.Dalwi on 13.8.86 and immediately finding of Yallubai's body soon thereafter and, the opinion of the doctor that she died as a result of shock due to perforation of uttered following abortion, makes out a full proof case against the accused. This post mortem is preformed on 20.8.86 at 4.00 p.m. and according to the doctor the death was 5-8 days prior to post mortem. Since the post mortem was exhibited by consent of defence, the contents thereof are required to be accepted as they are and, therefore, the period of death comes to between 13.8.86 to 14.8.86 or 15.8.86 which completely supports the prosecution case that Yallubai was missing from 13.8.86 and her body was found at the instance of accused as stated above.

36. Apart from other recovery, the prosecution has also brought on record the panchanama regarding recovery of torch which was used by the accused in the night while carrying

the body of Yallubai. Finding of same type of soil on the gunny bag in which Yallubai's body was taken to the field also strongly supports and proves the case of the prosecution. The trial Court has not at all considered all these important and vital aspects of the prosecution case and has come to a wrong and perverse conclusion that the prosecution has failed to bring home the guilt of the accused.

37. We are aware that this is an appeal against acquittal and the appellate court should not interfere with, if out of two views possible, the acquitting court has taken one view which is reasonable and plausible in the circumstances. In our considered opinion, the judgment of the trial Court is perverse inasmuch as all these vital and important documents considered by us hereinabove and their effect and consequences were not at all taken into consideration. The judgment of the trial Court and its reasoning, therefore, are perverse. They have resulted in serious miscarriage of justice and, therefore, this appeal has to be allowed partly

38. Regarding extent to which the appeal has

to be allowed, in our opinion, it has to be allowed against Original Accused No.3 Arjun Ganu Naik only against whom there is overwhelming evidence. Against other accused, the evidence is scanty and not sufficient and even if there is some evidence against accused No.4, 5 and 6, but there is no independent corroboration and, therefore, this appeal has to be allowed only against Original Accused No.3. Arjun Ganu Naik.

39. Accused No.3 was charged by the trial court for the offences under Sections 304, 315, 314, 316 318, 176 and 201 r/w 34 of the Indian Penal Code along with others. He was also charged by the trial Court for the offence under Section 376 of the Indian Penal Code. From the facts proved by the prosecution as stated by us above, accused No.3 has to be convicted under Sections 315, 316, 318 and 201 of the Indian Penal Code. In addition, he has to be convicted for the offence under Section 312 of the Indian Penal Code which runs as under :-

> "Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith

> for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

We are aware that the trial Court did not frame charge against accused No.3 for the offence under Section 312 of the IPC, but that will not come in our way in convicting him for the offence under Section 312, IPC. Because the offences from Sections 312 to 318 are of similar nature, type and category. They are all relating to miscarriage. Secondly, the punishment prescribed under Section 312 is not higher than the maximum punishment prescribed under Section 316. Because the punishment prescribed is up to ten years if the act causes death of quick unborn child. The maximum punishment prescribed under Section 312 is seven years if the woman be quick with child. From the evidence of P.W.8 Dr.Dalwi it is clear that deceased Yallubai had stated to him that she

was pregnant from accused No.3. The fact that the Yallubai was unmarried is not disputed. The grandmother of Yallubai had seen that she was pregnant and the fact that Yallubai's body was discovered at the instance of accused No.3. All these facts clearly show that accused No.3 was an instrumental in causing the woman to miscarry and obviously it was not done in good faith for the purpose of saving the life of the woman i.e. Yallubai. Miscarriage was with a view to wipe out evidence of Yallubai being pregnant. Therefore, for all these reasons We pass the following order :-

:ORDER:

Appeal of the State against acquittal is partly allowed so far as it relates to Accused No.3 Arjun Ganu Naik.

Accused No.3 Arjun Ganu Naik is convicted under Section 312 of the Indian Penal Code and sentenced to suffer R.I. for five years with fine of Rs.2000/- in default of payment of fine, he is further sentenced to suffer R.I. for six months.

Accused No.3 Arjun Ganu Naik is also convicted under Section 315 of the Indian Penal Code and sentenced to suffer R.I. for five years with fine of Rs.2000/- in default of payment of fine, he is further sentenced to suffer R.I. for six months.

Accused No.3 Arjun Ganu Naik is also convicted under Section 316 of the Indian Penal Code and sentenced to suffer R.I. for three years with fine of Rs.2000/- in default of payment of fine, he is further sentenced to suffer R.I. for six months.

Accused No.3 Arjun Ganu Naik is also convicted under Section 318 of the Indian Penal Code and sentenced to suffer R.I. for two years with fine of Rs.2000/- in default of payment of fine, he is further sentenced to suffer R.I. for six months.

Accused No.3 Arjun Ganu Naik is also convicted under Section 201 of the Indian Penal Code and sentenced to suffer R.I. for two years with fine of Rs.2000/- in

default of payment of fine, he is further sentenced to suffer R.I. for three months.

Accused No.3 Arjun Ganu Naik is on bail. His bail bond stands cancelled. He should surrender before the trial Court for undergoing sentence within a period of four weeks from today.

The Appeal of the State against other accused i.e. Accused Nos.1, 2, 4, 5 and 6 is dismissed. Acquittal of Accused Nos.1, 2, 4, 5 and 6 from the charges levelled against them is upheld.

Accused Nos.1, 2, 4, 5 and 6 are on bail. Their bail bonds stand cancelled.

All the substantive sentences to run concurrently.

Appeal is disposed off accordingly.

[D.G.DESHPANDE,J]

[S.R.SATHE,J]